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No. 90-745

Supreme Court, U.S.  
F I L E D

FEB 1 1991

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

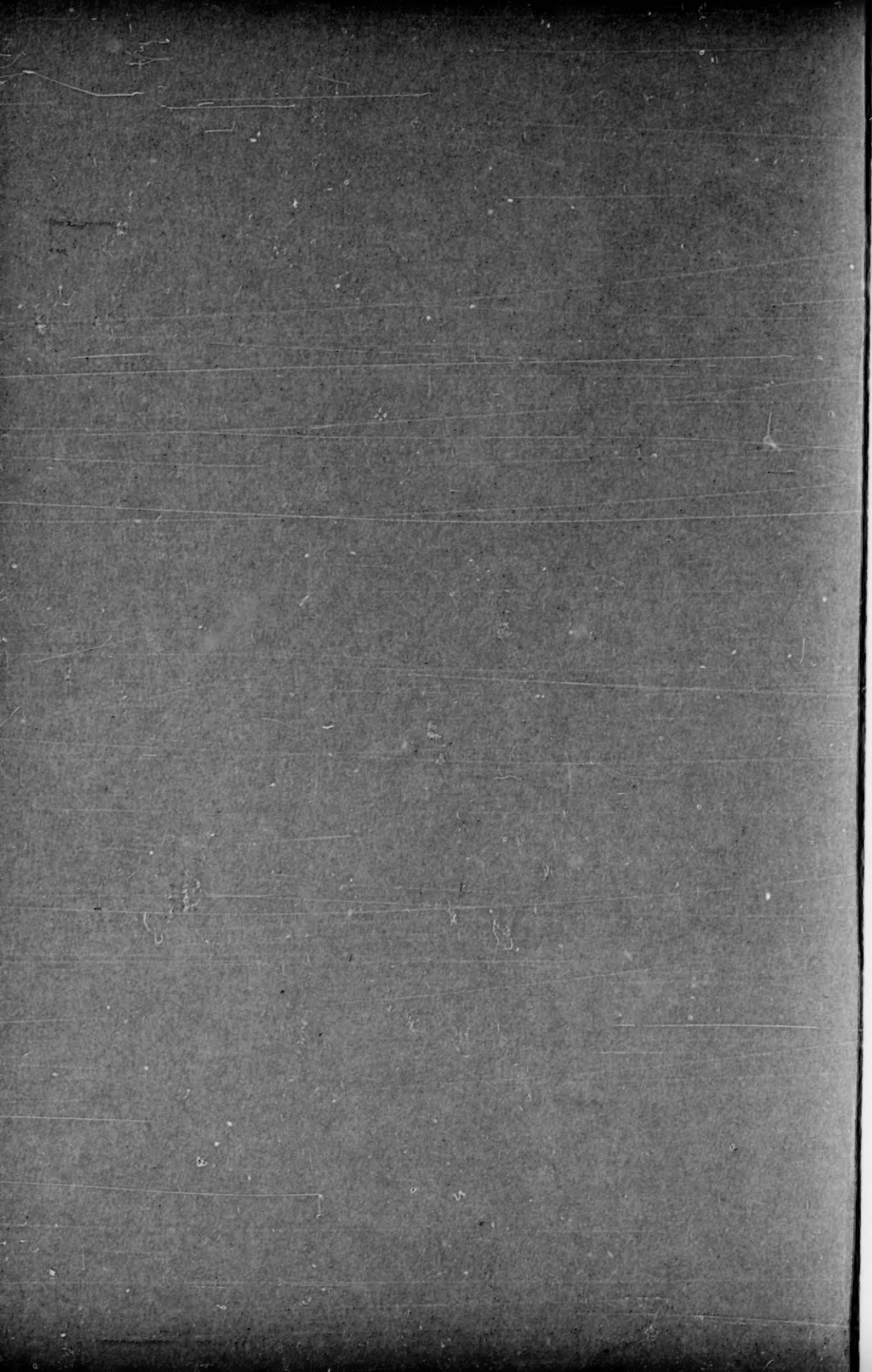
LINDA WHEELER TARPEH-DOE, individually and as mother  
and next friend of NYPENPAN TAREH-DOE,  
and MARILYN L. WHEELER,  
v. *Petitioners,*

THE UNITED STATES OF AMERICA, and  
THE SECRETARY OF STATE,  
*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit

**REPLY BRIEF FOR PETITIONERS**

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The Department's brief in opposition endeavors to assure this Court that the Department's administrative decision in this case was both fair and routine. In support of this goal, the Department reproduces *in toto* the heretofore undisclosed Gaither Memorandum in its Appendix.

A full understanding of the Gaither Memorandum, however, leads to the opposite conclusion. Had this litigation involved a federal tort claim with only out-of-country aspects, the Gaither Memorandum would never have been disclosed by the Department. The memorandum was ordered produced by the District Court in the on-going litigation of petitioners' in-country "headquarter's claim" only after a prolonged discovery dispute during which the

Department had asserted that the memorandum was privileged. See *Tarpeh-Doe v. United States*, slip op., No. 88-0270-LFO (D.D.C. Nov. 13, 1990).

Ironically, the Department now asserts that "the claims attorney's memorandum reveals a careful and comprehensive investigation of petitioners' claim." Brief for Resp. at 5 n.2. The irony lies both in the fact that the review was anything but careful and comprehensive and in the fact that the Department had sought protection of the memorandum on the grounds that it was prepared "in anticipation of litigation." That averment prompted the District Court to observe that a review in anticipation of litigation was inconsistent with an objective administrative adjudication. See Memorandum at Pet. App. 29a.

The Department's obvious attempt to defuse the constitutional dilemma by assuring this Court that the administrative review was fair encounters a major obstacle which petitioners are obliged to address: the Gaither Memorandum is largely wrong in both its law and facts. At the trial of the in-country component of this litigation—the verdict in which is under advisement by the District Court—the Department did not call as a witness a single physician or expert whose advice supposedly formed the basis of the Gaither Memorandum. While the Gaither Memorandum concludes that the child's injuries resulted from a staphylococcus infection, the Department's position at trial was that the child suffered from a streptococcus infection. The experts who ultimately testified for the Department at the trial of the in-country claim were not even contacted by the Department until years after the Gaither Memorandum was produced. To underscore the unreliability of the Gaither Memorandum, this Court should know that parts of the Gaither Memorandum were accepted in evidence at trial *against the Department*, over objection, as an admission by the Department that it really did not know the true nature of

the child's infection due to Dr. Lefton's masking of the salmonella organism.

The Department also points to the Gaither Memorandum in defending Dr. Lefton's decision not to evacuate the child. The Gaither Memorandum concludes that Dr. Lefton was not negligent in that regard because he chose to place the child in the care of Dr. Van Reken—"the best qualified and most experienced physician in Liberia for treating neonatal meningitis." Brief for Resp. at 6 n.3. According to the sworn testimony at trial, however, Dr. Van Reken was an American missionary physician practicing in Liberia who had never been utilized by the embassy before in a pediatric case. The only reason that Dr. Van Reken was called on the occasion of the child's illness was that the pediatrician ordinarily used by the embassy was unavailable. In actuality, Dr. Lefton entrusted the child to a physician of whose competence he was entirely unaware. It should also be noted that Dr. Van Reken was in charge of the pediatric ward at J.F.K. Hospital, a facility which the Department concedes was maintained in a deplorable condition.

The conclusion in the Gaither Memorandum that Mrs. Tarpeh-Doe was advised to deliver her child outside of Liberia is also contradicted by the sworn testimony of the witnesses at trial. Moreover, such advice was never specifically reduced to writing or included in any of the materials provided to Mrs. Tarpeh-Doe as part of her training. While such information was to be included in the standard health lecture to new employees, Mrs. Tarpeh-Doe denies it was discussed, and the instructor had no independent recollection of including such information in her lecture. Furthermore, the instructor's outline of her lecture did not specifically mention the policy to permit evacuation for childbirth, and Mrs. Tarpeh-Doe's copious class notes do not contain any mention of the policy either.



The testimony before the District Court also confirmed that the premature administration of antibiotics by Dr. Lefton masked the subsequent diagnostic tests performed by him. Dr. Lefton himself testified by deposition that it would have been normal procedure for him to perform a diagnostic spinal tap before administering antibiotics. Dr. Lefton had performed spinal taps on neonates before and could have done so in this case. His administration of antibiotics prior to diagnosis meant that the organism causing the baby's grave illness, salmonella, was not discovered until the baby arrived in Denver, Colorado.

The Gaither Memorandum also exculpates Dr. Lefton on this critical error in judgment, apparently on the grounds that Dr. Lefton was alone when the child was brought to the clinic. However, Nurse Clement was present and Dr. Lefton himself sent medical technician Mary Awantang away to locate Dr. Van Reken. Resp. App. at 13a-14a.

Other conclusions in the Gaither Memorandum relating to the in-country component of petitioners' claim were also contradicted by the testimony in the District Court. Contrary to the Gaither Memorandum's conclusions, the Department of State had actual notice of grave problems regarding Dr. Lefton's performance in Liberia. As part of a periodic inspection performed only a few months prior to the illness of baby Tarpeh-Doe, the State Department Inspection Corps reported the following:

The medical facility is totally inadequate. Located on the second floor of the Area Communications Office building on converted apartment space, the entire facility comprises about 2,400 square feet. It is crowded, dingy, and anti-therapeutic, among other shortcomings.

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The significant investment the Department has in the professional staff operating the facility makes it essential that priority be given to providing a fa-

cility which would meet minimum American health treatment facility standards.

\* \* \* \*

The Medical Unit must also improve its image and responsiveness. The inspectors received numerous complaints about it. Health units should make a positive contribution to morale and welfare, and the unit in Monrovia does the opposite.

\* \* \* \*

Complaints about the quality of official U.S. health services have been so widespread that it may be the single most significant non-environmental negative factor affecting morale at this post.

The reports of the inspection team were even more pointed regarding the performance of Dr. Lefton. Two months before the treatment of the Tarpeh-Doe baby, Ambassador Crowley, the inspection team leader, advised the deputy medical director at the Department "that there is 'widespread' discontent with Dr. Lefton's performance as RMO [Regional Medical Officer] in Monrovia." Serious consideration was given by the United States Ambassador in Liberia to transferring Dr. Lefton out of the country prior to his regular departure time. In a letter to Ambassador Swing, Dr. Lefton himself acknowledged that there was a widespread belief that "Dr. Lefton has lost interest, lacks sympathy, and is unresponsive to the needs of the community." The inspectors indicated that the complaints about Dr. Lefton were "unprecedented in their experience."

The Office of Medical Services in Washington had also received information that Dr. Lefton had recently gone through a divorce, that his former wife had attempted suicide, and that Dr. Lefton would frequently leave post and travel to Washington, where he would appear at the Office of Medical Services on Monday mornings with a three day growth of beard. None of this conduct spawned

even an inquiry into Dr. Lefton's professional capacities at the time.

The ultimate resolution of these problems was that Dr. Lefton departed the service of the Department of State before his term was completed; however, while these warning signals arose in 1981 and early 1982, Dr. Lefton's departure was not effective until September of 1982, after his mistreatment of baby Tarpeh-Doe.

One of the most startling aspects of the Gaither Memorandum is that in denying Mrs. Tarpeh-Doe's claim the Department of State adopted and applied that standard of medical care applicable to a Liberian rather than an American physician:

To be free of negligence, a doctor must have exercised the same reasonable and ordinary care, skill, and diligence as a physician in good standing in Liberia would have exercised in the same general line of practice and with the same facilities and equipment in a like case.

Gaither Memorandum, Resp. App. at 12a. While the Department defends this conclusion and lamely opines that "it does not appear that the source of applicable law was of controlling significance" (Brief for Resp. at 5 n.2), this conclusion is a major error and contrary to the explicit representations to employees of the Department that they would be assisted in obtaining the "best possible medical care."

The standard of medical care provided to Department of State employees abroad is set forth in the Uniform State/USIA/AID regulations incorporated in the Foreign Affairs Manual. Pet. at 4. The Gaither Memorandum dispenses with this promise on the theory that "Federal safety and procedure manuals . . . do not create an actionable duty on which tort liability may be based." Resp. App. at 10a. This notion is unsupported by the authorities. It would be more accurate to conclude, as



petitioners' argued in the District Court, that a voluntarily assumed standard of care between employer and employee creates a special relationship under which the employer will be held liable to conform to that standard.

It is apparent that the Department feels constrained to rely on the previously undisclosed Gaither Memorandum because the record herein demonstrates a complete lack of any due process afforded to Mrs. Tarpeh-Doe. However, the evidence presented before the District Court was wholly at odds with the Gaither Memorandum. Petitioners are obliged to bring this information to the attention of the Court because the Department has offered the Gaither Memorandum as a noble example of the standard of due process to which it voluntarily is willing to hold itself. The record in the District Court makes clear that had the Gaither Memorandum been provided to petitioners long ago, its unexamined assumptions and factual and legal inaccuracies could have been brought to the attention of the Department by petitioners and cured.

The Department's reliance on the Gaither Memorandum in this Court is an attempt to avoid review of an important constitutional question through assurances to the Court that the Department considers administrative claims fairly. In reality, the memorandum supports petitioners' arguments that the constitutional issues should be addressed by this Court because it graphically demonstrates the unfairness and error inherent in the Department's Star Chamber proceedings.

**CONCLUSION**

For the foregoing reasons and those stated in the Petition for Certiorari and in the Brief of Amici Curiae, the Court should grant the petition for *certiorari*.

Respectfully submitted,

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